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No. 92-146

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SHARON K. CESARO,
Petitioner,

v.

LAKEVILLE COMMUNITY SCHOOL DISTRICT,
LAKEVILLE EDUCATION ASSOCIATION,
AND THOR PETERSEN,
INDIVIDUALLY AND AS SUPERINTENDENT
OF LAKEVILLE COMMUNITY SCHOOL DISTRICT,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Sixth Circuit Court of Appeals properly rule that female Petitioner failed to prove sex discrimination under Title VII when it held that the School Board, as the ultimate decision maker, had no discriminatory intent in hiring a more qualified male applicant as Special Education Director?

II. Is the School District liable for discrimination under Title VII when the School Board considered outside applicants (as it had in the past) for the newly-created administrative position of Special Education Director, where Petitioner and other female applicants were not precluded from being appointed to the position, Petitioner was a finalist candidate for the position, and a more qualified male applicant was hired?

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STATEMENT OF THE CASE

Petitioner Sharon Cesaro served as a special education teacher for Respondent LakeVille Community Schools, a small school district in Otisville, Michigan, beginning in 1968. (Cesaro at TR 100). Her education included a bachelor's degree in elementary education, a master's degree and an educational specialist degree from the University of Michigan; she received certification from the University of Michigan and the Michigan Department of Education. Petitioner completed the necessary work for her doctorate in special education except for the doctoral thesis. (Cesaro at TR 101). In 1976 Petitioner successfully completed a two-month administrative internship at the Clio Area Schools (Michigan) (Petersen at TR 319).

On September 2, 1977, LakeVille Community Schools Superintendent Thor Petersen wrote a letter of recommendation "To Whom It May Concern" regarding Petitioner. The letter detailed Petitioner's background in special education. It acknowledged that Petitioner had prepared herself extremely well for the position of Director of Special Education and that when the time arrived, she would be considered as the district's "prime candidate" for the Director position and noted that Petitioner was "fully prepared both professionally and personally to assume responsibility of leadership in the area of special education." (R. 115: Findings of Fact at p. 8; R. 117: Resume of Pltf's Key Exhibits at p. 2, Pl.Ex.2(H), R.159, 159).

In 1978 the School District commissioned an outside consultant, Dr. Mary Blair, to conduct a study of the special education needs of the district. (Petersen at TR 294). In April 1978 Dr. Blair concluded her evaluation and submitted a report (the "Blair Report") to the LakeVille School Board. In her report, Dr. Blair identified various problems which existed in the special education program, including the coordination between special and vocational education and developing grant applications. (Petersen at TR 300). Based on state and national incidence comparisons, Dr. Blair concluded that the needs of the district's handicapped children were not being met. Accordingly, she rec-

ommended creating a Director of Special Education position and hiring an individual with a wide range of administrative experience to fill that position. (Petersen at TR 295).

The Blair Report emphasized the importance of the Director having experience or preparation in all fields of educating the handicapped. The recommendations in the Blair Report further stressed that the Director should have training and experience in teaching/administering various types of special education programs. (R. 117: Resume of Pltf's Key Exhibits, Ex.3(A) at pp. 24-25, R.159, 159).

In accordance with those recommendations, the Board of Education approved the establishment and posting of a Director of Special Education position, a high-level administrative position. Suggested qualifications for the position contained in the posting were incorporated from the Blair Report. (Petersen at TR 296).

On or about May 10, 1978, LakeVille Community Schools posted the position and invited applications. (R. 9: Answer to Complaint at paragraph 6; Pltf's Ex.5(A), R.159, 159). The position was posted within the school district and at major universities in Michigan. (R. 99: Deft's Proposed Findings of Fact at p. 2). Five applicants responded to the posting; Petitioner was among those who submitted applications. (R. 115: Findings of Fact at p. 2). Historically, administrative positions in the district had been filled either by promoting current employees or by hiring candidates from outside the district. (R. 115: Findings of Fact at p. 2). Superintendent Peterson testified that when an administrative position was newly created, the Board's written policy required external posting. (Peterson at TR 301-302). No evidence was adduced that external posting of the position was discriminatory.

The required qualifications for the Director position included approval and certification as a special education director, a minimum of a master's degree, a valid Michigan teaching certificate, experience as a school administrator for general education

and/or special education programs, and eligibility for state reimbursement as a special education director. Desired qualifications included experience in writing grants and developing a curriculum. (R. 117: Resume of Pltf's Key Exhibits at p. 4, Pltf's Ex.3(G), R.159 159).

A screening committee was appointed by Dr. Petersen to review applications, interview candidates, and make a recommendation of finalists to the Superintendent. (Deft's Ex.H; R.62, 62). The four-person, ad hoc screening committee was composed of Donald Blackwell, Director of Special Education and Principal of Southwest Elementary School; Jacqueline Dorland, a special education teacher employed by the District; Michael Flanders, Chairman of the School District's Special Education Advisory Council; and Laura Dorn, a parent. (R. 117: Resume of Pltf's Key Exhibits, Pltf's Ex.4(A). R.159, 159).

The committee interviewed the five applicants in a sex-neutral manner and submitted the names of three finalists to the Superintendent, recommending Dr. Gutshall as the most qualified. (R. 115: Findings of Fact at pp. 2, 5). Dr. Gutshall had served for several years in leadership positions. He was a special education teacher for ten years in the Lansing Public Schools (Michigan), Director of Special Education for the Muskegon Area Intermediate School District (Michigan) for three years, Assistant Professor of Administration and Special Education at Eastern Michigan University, Director of Programs and Assistant Superintendent at Howell State Hospital, Director of Special Services for the Alpena Public Schools (Michigan), and was fully certified as a Director of Special Education. (Petersen at TR 320). Petitioner was one of the three finalists referred to Dr. Petersen. After interviewing the three finalists, Dr. Petersen concurred that Dr. Gutshall was the most qualified and recommended him to the Board of Education. On July 20, 1978, the Board voted unanimously to appoint Dr. Gutshall as Director of Special Education. (R. 115: Findings of Fact at pp. 2, 3).

Petitioner presented testimony that Dr. Petersen had made discriminatory statements to the effect that the hiring of Peti-

tioner would be "over his dead body" and that he would not hire another woman. Dr. Petersen denied making such statements and further testified that he had considered Petitioner a viable candidate throughout the selection process through the time that the Board of Education took action on the hiring.

Contrary to Petitioner's assertion on page 8 of the Petition for Writ of Certiorari, no evidence was submitted that supports the statement that "Dr. Petersen only after viewing Cesaro's application, instituted an outside search in the entire State of Michigan for a director and came up with a white male who was appointed to the position." Rather, the evidence and findings are that the Superintendent had the position posted statewide prior to considering Petitioner's application and that all applicants, including Petitioner, were considered by the screening committee.

Petitioner further erroneously claims that the Board of Education was presented solely with Dr. Petersen's recommendation to hire the male candidate of "his choosing, without an opportunity for the School Board to consider comparative qualifications of Cesaro or the other candidates." (Petition for Writ at p. 13). The facts belie that assertion. Petitioner had been a special education teacher at the district since 1968; she was not unknown to the Board of Education. The Board reviewed Dr. Gutshall's credentials which, without question, exceeded Petitioner's.

Petitioner continues on page 14 of her Petition for Writ of Certiorari to mischaracterize the case, and claims that the Superintendent had "injected criteria in the selection process which would make the male, *Gutshall*, appear to be more qualified and further blatant sex discrimination occurred in the selection process." The evidence adduced at trial was that the qualifications for the position of Director of Special Education were derived from Dr. Blair's report. Further, Petitioner fails to cite any criteria which were "injected" to make Dr. Gutshall "appear more qualified." Even a superficial review of Dr. Gutshall's qualifications confirms he was substantially more qualified than Petitioner.

On November 16, 1978, Petitioner filed a complaint with the Michigan Department of Civil Rights alleging sex discrimination by Respondent for its failure to appoint her to the Director's position. In 1980 Petitioner filed a civil Complaint alleging seven counts against the district, the LakeVille Education Association, and Thor Petersen, individually and as Superintendent of the LakeVille Community School District: Count I, violation of 42 USC §2000e-5; Count II, violation of Fifth Amendment, deprivation of liberty and due process; Count III, violation of Fourteenth Amendment; Count IV, violation of 20 USC §1681, discrimination under Title IX as recipient of federal financial assistance; Count V, tortious interference with advantageous contractual relations; Count VI, breach of duty; and Count VII, discrimination by Education Association. On May 13, 1981, Petitioner amended her Complaint, adding Count VIII, violation of 42 USC §1983, and Count IX, violation of Michigan's Elliott-Larsen Civil Rights Act. The only defendant at the trial was the School District; the remaining defendants either had settled with Petitioner or had been dismissed.

On June 9, 1987, three and a half years following a three-day bench trial which took place in November 1983, District Judge Newblatt issued his Findings of Fact, ruling in favor of Petitioner. (R. 115: Findings of Fact). In the Findings of Fact, the trial court only addressed the issue of the claim of violation of Title VII, 42 U.S.C. §2000e. More than three years later, on September 21, 1990, the Damage award was issued in the amount of $237,885, plus prejudgment interest in the amount of $127,220, post-judgment interest at the rate of 7.78%, and attorney fees. (R. 130: Judgment).

On January 9, 1992, the Sixth Circuit Court of Appeals issued its ruling reversing the trial court and finding that Petitioner failed to prove that her gender played any part in the decision of the Board of Education, as the ultimate decision maker, to hire Dr. Gutshall. *Cesaro v. LakeVille Community Schools*, 953 F.2d 252 (6th Cir. 1992). There was no evidence that the Board was aware of any sex-based reason for statewide

posting. Further, the external posting was not the ultimate employment decision on which *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), focused and, thus, Dr. Petersen's motivation was irrelevant. The Court of Appeals also noted that the application process did not preclude a woman from being hired if she were more qualified. Moreover, substantial case law confirms that when an employer selects a more qualified candidate, the discrimination claim by the disappointed applicant is likely to fail. *Id.* at 255.

Petitioner then filed a Motion for Rehearing or Rehearing En Banc claiming, primarily, that the Sixth Circuit misapplied *Price Waterhouse* as to the ultimate decision maker for finding liability, that the Court's decision effectively relieved the employer of liability, and that the Civil Rights Act of 1991 is to be applied retroactively to this case. Petitioner also claimed that a conflict exists in the Sixth Circuit as to application of respondeat superior liability to a two-tier decision making process. The Court of Appeals rejected the Motion on April 17, 1992, as a majority of the judges on the panel concluded rehearing was unwarranted.

SUMMARY OF ARGUMENT

The trial court found that the Respondent discriminated against Petitioner based upon her sex when it failed to promote her to the position of Special Education Director. Respondent sought outside applicants, as it had done in the past, and subsequently hired a more qualified male candidate. The trial court concluded that "but for" Petitioner's sex, she automatically would have been appointed to the Director's position, even though the solicitation of outside applicants was sexually neutral and both the screening committee and the Board of Education acted without discriminatory intent.

The Sixth Circuit Court of Appeals reversed the trial court, finding that, based upon *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Petitioner failed to carry her burden of proving that her gender was a motivating factor in the decision to hire a more

qualified male. The Court held that, consistent with *Price Waterhouse*, the Court is to look at the motive of the decision maker at the time the decision is made. The Board of Education lacked discriminatory animus, and the selection process did not preclude Petitioner from being appointed to the position.

The issues raised in Petitioner's Writ parallel those set forth in her Motion for Rehearing to the Sixth Circuit Court of Appeals which that Court declined to hear. Although Petitioner contends there is "a clear conflict of decisions amongst the circuits in mixed motive cases where discrimination is a motivating factor but not at the instant of the final decision," Petitioner fails to cite any circuits other than the Sixth Circuit to support her contention of such a "clear conflict." She references a single Sixth Circuit decision of *Simpson v. Diversitech, Inc.*, 945 F.2d 156 (6th Cir. 1991), *cert denied*, 112 S.Ct. 1972 (1992), to represent the conflict. However, the cases are factually distinguishable as *Simpson* involves the discharge of a black male following racist statements by his direct supervisor. In contrast, this case involves a hiring decision where a sex neutral policy was employed and the most qualified candidate was hired. Moreover, the Sixth Circuit Court of Appeals' application of *Price Waterhouse*, considering the motive at the time "a decision was made," is consistent with rulings of the Seventh Circuit and other Sixth Circuit decisions.

Petitioner's second argument is that a conflict exists among the circuits as to whether unlawful discrimination of upper management can be imputed to the employer. Petitioner cites this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and a Michigan Court of Appeals decision in *McCalla v. Ellis*, 446 N.W.2d 904 (1989), *lv denied*, 452 N.W.2d 641 (1990), to support this claim. Neither of those decisions address *Price Waterhouse*, the controlling case law. The Sixth Circuit opinion in this case and the *Price Waterhouse* decision left untouched the concept of respondeat superior where the "decision maker" discriminated, which is not the case here.

Thirdly, Petitioner argues that this Court should resolve whether §107 of the Civil Rights Act of 1991, 42 U.S.C. §2000e,

et seq., should be applied retroactively. All the Circuit Courts of Appeal addressing retroactivity of the Civil Rights Act of 1991 have found that it is *not* to be applied retroactively. No conflict exists, therefore negating the need for this Court to review the matter.

Finally, Petitioner asserts that the Sixth Circuit decision is "bad law and defies the rules of fair play and social justice." Respondent counters that Petitioner exaggerates the impact of the Sixth Circuit's opinion. The decision, contrary to Petitioner's assertion, does not forecast a demise of Title VII and employer liability, particularly if Petitioner is accurate in her assertion that the 1991 Civil Rights Act amendment would effect a different outcome.

ARGUMENT

I. THE SIXTH CIRCUIT'S HOLDING IS CONSISTENT WITH OTHER RULINGS, INCLUDING THIS COURT'S, IN ITS APPLICATION OF THE MIXED MOTIVE TEST REVIEWING WHETHER THE ULTIMATE DECISION MAKER HAD A DISCRIMINATORY ANIMUS AT THE MOMENT THE DECISION WAS MADE.

Petitioner's argument in Part 1 of her Brief distorts the evidence and the lower court's findings in an attempt to convince this Court that the extraordinary relief of certiorari be granted. A review of the evidence confirms that the Sixth Circuit properly ruled and that certiorari is unwarranted.

On page 23 of the Petition for Writ of Certiorari, Petitioner states:

> The District Court found that the Defendant's Superintendent, Petersen, unlawfully denied Plaintiff a promotion to the position of Director of Special Education because of her sex. Petersen had utilized a selection procedure which he opened to outside candidates instead of following past practice and promoting from within the school district's work force. That gave him an opportunity to select someone other than a female. He specified criteria in the selection procedure which discriminated against Plaintiff.

Contrary to Petitioner's assertions, a review of the opinions of both the District Court and the Court of Appeals confirms that the school district, in the past, had used both internal and external posting when hiring administrators. *Cesaro v. LakeVille Community Schools*, 953 F.2d 252, 253 (6th Cir. 1992) (R. 115: Findings of Fact at pp. 3, 11). Further, external posting of vacancies was sex neutral and could have resulted in the hiring of a female. *Cesaro*, 953 F.2d at 256. (R. 115: Findings of Fact at pp. 13-14).

Continuing, Petitioner states that the Board made no independent decision and that the Superintendent's "recommendation" was a de facto hiring decision. (Petition for Writ at pp. 24-25). This claim fails to recognize that Petitioner had been employed at the school district for ten years at the time of the posting. The Board knew that Petitioner's qualifications and background did not compare to those of Dr. Gutshall, the successful applicant.

Petitioner further claims that the Sixth Circuit's ruling is inconsistent with *Simpson v. Diversitech General,* 945 F.2d 156 (6th Cir. 1991), *cert denied,* 112 S.Ct. 1072 (1992). In *Simpson,* the issue was whether a black, male employee was discriminatorily discharged for misconduct under a last-chance agreement. The supervisor who recommended the discipline that resulted in the last-chance agreement had referred to the plaintiff as a "nigger" on a number of occasions. The supervisor, however, played no role in the investigation or action of misconduct or in drafting the agreement. The trial court applied the mixed motive test of *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), and dismissed the case as the employer proved that the plaintiff would have been discharged even in the absence of discrimination.

The Sixth Circuit found in the plaintiff's favor and determined that nothing had occurred between the second incident and formation of the last-chance agreement which expunged the supervisor's discrimination, reversing the trial court and remanding the case. Judge Kennedy dissented, stating that there was no evidence of any racial bias by the actual decision makers who disciplined plaintiff, citing *Price Waterhouse.* She also outlined relevant facts not presented in the majority opinion.

Here, the trial court's Findings of Fact fail to support the conclusion that the decision to post the vacancy statewide was related to Petitioner's sex. Judge Newblatt noted that the Respondent had in the past posted administrative vacancies both internally and externally. Unlike *Simpson,* in which the discrimination was related directly to race and casually related to discipline, the statewide posting was sex neutral and did not foreclose Petitioner

from the promotion. Neither the posting nor the decision to post was discriminatory. No evidence was adduced that Dr. Petersen would *not* have posted statewide if an internal male candidate existed. Moreover, the external posting of a newly-created administrative position was a reasonable and logical action aimed at assuring the hiring of the best qualified candidate.

Further, a screening committee interviewed the applicants and found Dr. Gutshall to be the most qualified candidate. The Board of Education is statutorily vested with the authority to hire administrators. MCL 380.132; MSA 15.4132 The Board is the only entity which can make such decisions, and it acted without discriminatory intent. *Simpson* also is distinguishable as the supervisor's references to the plaintiff as a "nigger" were unequivocally racist and discriminatory. In contrast, the remarks ascribed to Dr. Petersen were not nefarious or inflammatory. Stray remarks do not give rise to a colorable claim of discrimination. *Price Waterhouse*, 490 U.S. at 277.

Assuming that the *Simpson* and *Cesaro* cases are indistinguishable, Judge Kennedy's dissent in *Simpson* is more persuasive as she properly relied on *Price Waterhouse*. In *Simpson*, Judge Kennedy cited Justice Brennan's plurality opinion, stating:

> In discussing when a case becomes a mixed-motive case under Title VII, the Supreme Court has held that [t]he critical inquiry, the one commanded by the words of §703(a)(1) [of Title VII], is whether [the illegitimate consideration] was a factor in *the* employment decision *at the moment it was made*." . . . ("When, therefore, an employer considers both gender and legitimate factors *at the time of making a decision*, that decision was (" 'because of' sex . . .") . . . ("In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer *at the moment of the decision* what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.") . . . (the focus is on whether gender was a factor in a *particular* decision

> *when it was made*") . . . (Emphasis in original). *Simpson*, 945 F.2d at 162-163.

Writing on behalf of the Court in *Cesaro*, Judge Kennedy similarly explained:

> Gender plays a motivating part in an employment decision if one of the reasons "at the moment of the decision" was that the applicant was female. . . . Whether plaintiff's case is characterized as a pretext case or a mixed motive case, plaintiff's burden is to prove her gender played a part in the board's decision not to hire her as Director of Special Education. (Citations omitted). *Cesaro*, 953 F.2d at 254.

Judge Kennedy's opinion in both cases directly relied upon and correctly applied the unambiguous language of *Price Waterhouse* while the two-member majority in *Simpson* simply ignored this Court's binding precedent. The discriminatory action alleged here was the hiring of a more qualified male candidate by a board of education which had no discriminatory animus. The *Price Waterhouse* analysis established by this Court avoids unrelated or irrelevant events resulting in tenuous findings of discrimination.

More recently, the Sixth Circuit in *Wilson v. Stroh Brewery*, 952 F.2d 942 (6th Cir. 1992), reviewed the applicability of *Simpson* in a discharge action. Plaintiff, a black male, averred that the general manager's racial animus infected the decision of the industrial relations director to discharge plaintiff for insubordination. The plaintiff argued that the manager's intent should be imputed to the decision makers who lacked any racist bias. The employer responded that the racist comments or desires of an intermediate level supervisor do not establish a prima facie case of discriminatory discharge when an upper level official made the decision and conducted an independent investigation. The trial court granted the defendant's motion for summary judgment, finding that the plaintiff had failed to carry his burden of proof as

he showed no nexus between the manager's bias and the decision to terminate.

On appeal, the Sixth Circuit labeled the issue as whether the plaintiff submitted evidence that the manager's racial animus was the cause of his termination. The Court found that the plaintiff had failed to submit evidence that the manager's discriminatory motive influenced the decision makers. The plaintiff cited *Simpson,* but the Sixth Circuit rejected its application. The Court explained:

> *Price Waterhouse* offers some illumination in this case. The Supreme Court stated, "[i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer *at the moment of the decision* what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." . . . In Wilson's case, there is no evidence that any of Roselli's reasons for discharging Wilson related to race. During his deposition, Wilson was unable to offer any evidence that either Holloway or Roselli was in any way racially motivated. This is not a "mixed motives" case. (Emphasis added). *Wilson,* 952 F.2d at 946.

Summary judgment was affirmed. See also *McCarthy v. Kemper Life Insurance Co.,* 924 F.2d 683 (7th Cir. 1991); *Rush v. McDonalds Corporation,* 966 F.2d 1104 (7th Cir. 1992); *Greanias v. Sears, Roebuck & Co.,* 774 F.Supp. 462 (N.D. Ill. 1991).

Other circuits have reached the same conclusion as did the Sixth Circuit in *Cesaro.* In *North v. Madison Area Association,* 844 F.2d 401 (7th Cir. 1988), the plaintiff alleged that he was discriminatorily discharged based upon a supervisor's recommendation to the board of directors. The supervisor, according to the plaintiff, harbored racist bias. The court ruled that although the plaintiff claimed that the board of directors was a "rubber stamp" for the supervisor, the evidence did not support such a holding. No evidence suggested that discrimination played any role in the

board's decision to terminate the plaintiff despite the supervisor's assertion that he ran the board. The Title VII action was deemed meritless.

Likewise, the Seventh Circuit in *Partee v. Metropolitan School District,* 954 F.2d 454 (7th Cir. 1992), addressed the imputation issue in a manner paralleling the Sixth Circuit's action in this case. The plaintiff alleged that the superintendent violated her First Amendment rights of freedom of speech when he advised her not to speak publicly about students' standardized test scores. The trial court granted summary judgment to the defendants on a §1983 claim for First Amendment violations. The district court held that the school district was not liable under respondeat superior for the superintendent's actions. The appellate court affirmed, stating:

> The district court decided that the school board, not McDaniel, has final policymaking authority regarding Partee's out-of-classroom speech. The district court relied on Indiana law and school district policy in coming to this conclusion. First, Indiana law provides that school boards, not superintendents, have the authority to "prepare, make, enforce, amend, or repeal rules, regulations, and procedures for the government and management of the ... school corporation, its agents, employees and pupils.... Superintendents, by contrast, have the power merely *"to make recommendations to the board* concerning ... the employment and dismissal of personnel, ... and all other matters pertaining to the conduct of the school ..." ... Superintendents have the power to make recommendations, but school boards set final policy. In addition, School District Policy ... provides that teachers should consult with their superintendents "before initiating any statements concerning the general welfare of the school system." Any decision by the superintendent under this policy was not final, however, because Partee could have

appealed to the school board. (Emphasis in original, citations omitted). *Partee,* 954 F.2d at 456.

Likewise here, no evidence supports the conclusion, even assuming Dr. Petersen had a sexist intent, that his sentiment infected the hiring decision "at the time the decision was made" or influenced the Board members to hire the more qualified male applicant. The Superintendent did not have the authority to hire administrators. Petitioner has failed to prove her case, and the earlier decision must be sustained.

II. NO CONFLICT EXISTS AMONG THE CIRCUITS AS TO WHETHER THE UNLAWFUL DISCRIMINATION OF AN UPPER MANAGEMENT EMPLOYEE CAN BE IMPUTED TO THE EMPLOYER.

It is Petitioner's contention that there is a conflict among the circuits on the application of respondeat superior where an upper management employee is involved and that the Sixth Circuit's ruling in this case would absolutely insulate boards of education from liability. Petitioner re-writes the Court's decision in her description of the ruling when she asserts that a "board (or any employer for that matter) can only be held liable for *it's [sic] own* intentional discrimination and may not be held liable on a 'respondeat superior' theory for unknowingly implementing the discriminatory goals." (Petition for Writ at p. 33).

Nowhere in the Court of Appeals' decision is such a holding expressed or implied. Instead, the Court found that an employer is liable where the individual or entity, such as a board, making the decision discriminates on an unlawful basis. An action—even if it may be unlawfully discriminatory—which is not the event precipitating the alleged discrimination, does not give rise to a viable complaint.

Petitioner cites *Farber v. Massillon Board of Education,* 917 F.2d 1391 (6th Cir. 1990), *cert. denied,* 111 S.Ct 2851 (1991), to support her position that the Board of Education in this case is improperly being relieved of liability. Plaintiff's reliance on Farber

is misplaced. A review of *Farber* reveals that it does not address the issue of respondeat superior or affect the absence of discriminatory intent by the decision maker. Moreover, in *Farber* the successful male applicants were clearly less qualified than the older female applicant who had more years of experience in the school district and was repeatedly denied promotions.

In stark contrast, in this instance Dr. Gutshall was clearly more qualified than the Petitioner and was hired through a sex-neutral procedure where there was no evidence of discrimination by the screening committee or by the Board of Education which was the hiring entity. Further, while Dr. Petersen was initially named as a co-defendant, prior to the trial he was voluntarily dismissed pursuant to a nominal settlement with Petitioner.

Petitioner also references *Anderson v. Methodist Evangelical Hospital*, 464 F.2d 723 (6th Cir. 1972), to support the claim that respondeat superior applies even where the Board of Education lacks discriminatory intent. *Anderson* predates *Price Waterhouse* by more than fifteen years. Nonetheless, Judge Kent dissented in *Anderson* that the hospital board had no racial animus and he was not satisfied with the district court's findings that the discharge violated Title VII of the Civil Rights Act of 1991, 42 U.S.C. §2000e, *et seq.* Judge Kent explained that he read the Act to require that discrimination necessary to constitute an unlawful employment practice must be discrimination by the employer and, thus, recommended reversal of the Court's decision. The principles subsequently established by this Court in *Price Waterhouse* are contrary to those employed in *Anderson.*

Petitioner further relies on *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *McCalla v. Ellis*, 446 N.W.2d 904 (1989), *lv denied*, 452 N.W.2d 641 (1990), to support her position that the *Cesaro* decision conflicts with prior rulings on per se employer liability. Yet again, Petitioner can only argue this point through improper over-extension of the holdings of the referenced cases. The *McCalla* decision involved the rape of a female employee by her supervisor, which is not comparable to the present action. The supervisors in both *Meritor Savings* and

McCalla were in positions to make employment decisions, and were found to have sexually harassed the plaintiffs.

Contrary to Petitioner's assertion, the concept of respondeat superior remains intact in the wake of the Court of Appeals' action in this case. The Sixth Circuit's opinion focused on whether the decision maker, i.e., the hiring body, discriminated. If so, liability of the employer would result. However, where the decision maker did not act with unlawful discriminatory intent, no liability would be imposed on the employer, consistent with *Price Waterhouse*. Here, the Superintendent did not have the authority to hire administrators; the Board of Education was solely vested with that power. Moreover, the Board did not make its decision in a vacuum. Petitioner had worked at the district for ten years, and the Board was aware of her qualifications as well as those of Dr. Gutshall.

Incorporation of the facts repeatedly ignored by Petitioner confirms the appropriateness of the Circuit Court's ruling and the absence of merit for Petitioner's request for certiorari. The salient facts are that this was a newly-created administrative position, the position was posted both externally and internally as in the past, external posting in the past had resulted in the hiring of a female administrator while Dr. Petersen was Superintendent, posting externally was gender neutral, a screening committee of women and men interviewed the candidates and concluded that Dr. Gutshall was more qualified, Dr. Petersen recommended the most qualified applicant, and the Board of Education acted without discriminatory intent. It is with these factors in mind that the Sixth Circuit reversed the trial court and held that Petitioner did not sustain her burden of proof. These facts similarly demonstrate that granting certiorari is unwarranted.

III. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS REGARDING THE RETROACTIVE APPLICATION OF THE 1991 CIVIL RIGHTS ACT, CONTRARY TO PETITIONER'S ASSERTION.

In Part III of the Petition for Writ of Certiorari, Petitioner contends that the 1991 Civil Rights Act applies retroactively and thereby imposes a restrictive reading to *Price Waterhouse*. Petitioner erroneously claims that there are conflicting rulings among the circuits on this issue. A survey of opinions of the Courts of Appeal confirms that those circuits reviewing the issue have consistently held that the Act is prospective. Because all circuits addressing the issue have rejected the retroactivity of the 1991 Act, Petitioner's argument is meritless and the Petition must be denied.

In *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), an affirmative action plan between the city, its police department, and a union was challenged on the basis of the new amendments to Title VII. The Sixth Circuit reviewed Supreme Court rulings regarding the retroactivity of statutes in the absence of specific language. The Sixth Circuit noted the ambiguous congressional history, the EEOC policy statement that the Act is prospective, and conflicting district court decisions and concluded:

> This is consistent with our recent decision in *United States v. Murphy*, 937 F.2d 1031 (6th Cir. 1991), where we had to decide whether, absent clear legislative intent, a provision of the False Claims Act should apply retroactively or prospectively. We stated that the choice was "between the broad statement of the law in *Bradley* and the recent affirmation in *Bowen* of the general rule against retrospective application." . . . While recognizing that we frequently have cited *Bradley* as controlling, we nevertheless held that *Bradley* should be read narrowly and should not be applied in contexts where "substantive rights and liabilities," broadly construed, would be affected. . . . Clearly, retroactive application of

> the 1991 Act would affect "substantive rights and liabilities" of the parties to this action.
>
> We hold that the 1991 Act does not apply retroactively to Vogel's claim for damages resulting from the hiring policy the City's police department adopted pursuant to the consent decree. We therefore apply the law that was in effect prior to enactment of the 1991 Act. *Vogel*, 959 F.2d at 598.

Other circuits have reached the same conclusion. See, for example, *Johnson v. Uncle Ben's, Inc.*, 965 F2d 1363 (5th Cir. 1992), refusal to apply §101 retroactively; *Mozee v. American Commercial Marine Service*, 963 F.2d 929 (7th Cir. 1992); *Fray v. Omaha Herald*, 960 F.2d 1370 (8th Cir. 1992).

Additionally, prospective application is consistent with the vast majority of district court decisions. In *Tyree v. Riley*, 783 F.Supp. 877 (D. N.J. 1992), in an extremely detailed analysis, Judge Lechner outlined the Supreme Court's decisions from 1806 to the present on the retroactivity of statutory amendments finding the Act to be prospective. Judge Lechner summarized:

> The principle that statutes operate only prospectively while judicial decisions operate retrospectively is familiar to every law student. *Id.* at 16.

Other district courts finding the Act prospective are: *Johnson v. Rice*, 58 FEP Cases 31 (S.D. Ohio 1992); *Sofferin v. American Air Lines*, 785 F.Supp. 780 (N.D. Ill. 1992) ; *McCullough v. Consolidated Rail Corporation*, 785 F.Supp. 1309 (N.D. Ill. 1992); *VanMeter v. Barr*, 778 F.Supp. 83 (D. D.C. 1991); *Sorlucco v. New York City Police Department*, 780 F.Supp. 202 (S.D. N.Y. 1992), *Khandelwal v. Compuadd Corp.*, 780 F.Supp. 1077 (E.D. Va. 1992); *Simmons v. Southwest Petro-Chem, Inc.*, 58 FEP Cases 78 (D. Ka. 1992); *Conerly v. CVN Company*, 785 F.Supp. 810 (D. Minn. 1992); *McLaughlin v. New York Governor's Office*, 784 F.Supp. 961 (N.D. N.Y. 1992); *Hameister v. Harley-Davison, Inc.*, 785 F.Supp. 113 (E.D. Wis. 1992); *Doe v. Palm Beach County*, 783 F.Supp. 1379 (S.D. Fla. 1992); *Hansel*

v. Public Service Company, 778 F.Supp. 1126 (D. Colo. 1992); *James v. American International Recovery*, 57 FEP Cases 1226 (N.D. Ga. 1992); *Holman v. Macy's South, Inc.*, 57 FEP Cases 1405 (N.D. Ga. 1992); *High v. Broadway Industries*, 57 FEP Cases 1159 (W.D. Mo. 1992).

To support retroactivity and a "conflict" among the circuits, Petitioner cites three federal district court decisions: *Mojica v. Gannett*, 779 F.Supp. 94 (N.D. Ill. 1991), which was issued prior to the EEOC policy statements that the amendments are to be prospective; *LaCour v. Harris County*, 57 FEP Cases 622 (S.D. Tex. 1991), an unreported decision; and *Alexandre v. AMP, Inc.*, 57 FEP Cases 768 (W.D. Pa. 1991), also an unreported decision. The *Mojica* opinion conflicts with *Sofferin* and *McCullough* in the same district. See also *Davis v. Tri-State Mack Distributors*, 57 FEP Cases 1023 (E.D. Ark. 1991); *Graham v. Bodine Electric Co.*, 782 F.Supp. 74 (N.D. Ill. 1992); *Stender v. Lucky Stores*, 780 F.Supp. 1302 (N.D. Cal. 1992); *Bristow v. Drake Street, Inc.*, 57 FEP Cases 1367 (N.D. Ill. 1992); *Burchfield v. Derwinski*, 782 F.Supp. 532 (D. Colo. 1992); *King v. Shelby Medical Center*, 779 F.Supp. 157 (N.D. Ala. 1991). Unquestionably, Petitioner fails to support her contention that a conflict exists among the circuits; thus, certiorari based upon the 1991 amendment is unwarranted.

Even if the 1991 Act is retroactive and affected *Price Waterhouse*, this Court's language that one must consider whether the "employment decision at the time it was made" and who was the "decision maker" was not altered. The amendments focused on whether discrimination was the motivating factor causing harm to be suffered. The employer is not liable if it establishes that it would have made the same decision absent the discrimination. Here, the alleged discriminatory act was the statewide posting of the Director's position. The School District posted in the past, and it would logically post a newly-created administrative position on a statewide basis to assure the broadest qualified applicant pool. Superintendent Petersen testified that a standard procedure was followed for newly created vacancies. In

such cases, after the Board of Education's approval of a position and its qualifications, the Board would notify the Administrators' Association and major Michigan Colleges and Universities. (Petersen at (TR.302). Petitioner was always a viable candidate regardless of the statewide posting. The posting did not foreclose her from consideration. Thus, the same decision to post statewide would have been made, even assuming a discriminatory animus was presented, and certiorari is wholly unwarranted.

IV. PETITIONER'S ASSERTION THAT IF CESARO STANDS IT WILL EXONERATE EMPLOYERS FROM LIABILITY FROM DISCRIMINATORY ACTS AND THAT IT "DEFIES THE RULES OF FAIR PLAY AND SOCIAL JUSTICE" IS WITHOUT FOUNDATION.

Petitioner's argument of social injustice, contained in Part IV of her Petition, distorts the earlier ruling and speciously argues that a social injustice has occurred. (It is not the function of the judiciary to right social injustice; the courts interpret the Constitution and statutes and apply them as they were written.) Petitioner claims that the Superintendent corrupted the process at every level. The evidence controverts this claim since a sex-neutral application process was used, the screening committee and the Board of Education had no discriminatory intent, and a more qualified applicant was hired. As the Appeals Court noted, "the purpose of Title VII is to focus on qualification. That is what the employer did here." 953 F.2d at 256.

Petitioner claims, on page 51 of the Petition, that enforcement of Title VII abuses will be weakened, if not destroyed, if *Cesaro* stands. This contradicts Petitioner's earlier argument for certiorari that the 1991 Civil Rights Amendment would necessitate an alternative conclusion. Petitioner cannot have it both ways.

Petitioner next avers that Title VII's purpose of removing barriers and providing a "level playing field" for women and minorities will be diminished, if not destroyed. Petitioner is not

seeking a level playing field; she seeks the advantage of being granted a newly-created, high level administrative position without any others being considered for the vacancy. She desires that the employer not use a sex neutral process by posting a vacancy to consider a greater applicant pool in an effort to ensure hiring the most qualified applicant, regardless of sex or race. Title VII does not afford Petitioner preferential treatment to the detriment of a more qualified candidate.

Petitioner's assertions in Part IV of her Petition are frivolous and unsupported both legally and factually. Accordingly, denial of the Petition for a Writ of Certiorari is mandated.

CONCLUSION

Petitioner fails to adequately support her contentions with case law or statutes that the Sixth Circuit reached a conclusion which differed from this or other court rulings. This case does not invoke substantive public policy and a social injustice issue to warrant the extraordinary review by this Court. Granting certiorari is unjustified and, therefore, must be denied.

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